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No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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INDEX.

	Page
Statement	1
Argument:	
I. Reviewing power and original jurisdiction of Appellate Courts	2
II. The alleged huge task of subjecting competitors to similar orders does not actually exist and could be eliminated if a trade practice conference is granted	5
III. The Commission cannot blind its eyes to obvious facts in the record and is arguing against the very purpose for which the Robinson-Patman Act was enacted	8
IV. Previously hereto in other industries the Commission has either filed simultaneous complaints or held trade practice conferences	9
V. Cases cited by Commission in its brief are not applicable to the factual situation here	11
Conclusion	14

CITATIONS.

Cases:	
American Chain & Cable Co. v. Federal Trade Commission, 142 F. 2d 909	12
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67	3, 10
Federal Trade Commission v. Cement Institute, 333 U. S. 683	10
Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619, 623	3, 11

Federal Trade Commission v. C. E. Niehoff & Co., 241 F. 2d 37 1
Federal Trade Commission v. Morton Salt Co., 334 U. S. 37 8
Federal Trade Commission v. Pacific State Paper Trade Ass'n, 273 U. S. 52 3
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134 12
International Shoe Co. v. Federal Trade Commission, 280 U. S. 291, 299 4
McConihay v. Wright, 121 U. S. 201 2
Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 722 2
Osborne v. United States Bank, 9 Wheat. 738, 819 2
Scripps Howard Radio v. Federal Trade Commission, 316 U. S. 4, 17 ..... 3, 13
United States v. Wabash Railroad Co., 321 U. S. 403 13

Statutes:

Federal Trade Commission Act of 1914, 38 Stat. 719 as amended 3
52 Stat. 111, 113, 15 U. S. C. 45 (c) 3

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PETITIONER'S REPLY BRIEF.

STATEMENT.

The brief of the Commission contains no denial of the fact that petitioner will suffer financial injury and loss by not being able to compete with its competitors who continue to offer volume discounts, if the Order of the Federal Trade Commission to Cease and Desist such practice is not stayed and the petitioner given equitable relief therefrom. Inasmuch as the Commission has seen fit to file its brief in this case and include by reference the arguments which it made in its brief in **Federal Trade Commission v. C. E. Niehoff & Co.** (No. 110 this Term), your petitioner has been compelled to refer to two briefs to frame this reply and in order to do so will attempt to follow Sections numbered 1, 2, 3 and 4 as set out in the Commission's brief filed in the instant proceedings.

ARGUMENT.

I.

Reviewing Power and Original Jurisdiction of Appellate Courts.

The petitioner emphatically denies that one of the questions in this case is "whether postponement of enforcement (either by modifying the agency's order or by withholding entry of decree of affirmance) constitutes unwarranted substitution of the Court's judgment for that of the Commission," which statement appears at the top of page 11 of the Commission's brief. The motion of petitioner filed in the Court of Appeals below was for equitable relief to prevent irreparable injury and the prayer for relief was for the Court to exercise its equitable jurisdiction and modify the Commission's order as to the date of its effectiveness, and the alleged question of substitution of the Court's judgment for that of the Commission is an obvious attempt on the part of the Commission to avoid the actual issues in this case.

The foregoing statement of the Commission of a so-called question in the case is an evident attempt to avoid the rulings of this Court cited on pages 12 and 13 of our main brief as to the original equitable jurisdiction of the Court. **McConihay v. Wright**, 121 U. S. 201; **Osborn v. United States Bank**, 9 Wheat. 738, 819; **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 722. We again state that under our Constitution and the rulings of this Court that the Court of Appeals and this Court has original equitable jurisdiction notwithstanding the devious arguments to the contrary presented in various technical forms by the Commission in their brief in language inferring that the Court of Appeals and this Court has no such jurisdiction.

The Commission made no finding of facts on this point in controversy here for the simple reason that the Federal Trade Commission has no equitable jurisdiction (**Federal Trade Commission v. Eastman Kodak Co.**, 274 U. S. 619, 623). The Federal Trade Commission is not a judicial body and hence has no jurisdiction to decide equitable issues. Therefore, there is no basis for the statement noted as to substitution of its judgment for that of the Commission. The motion for equitable relief filed by petitioner in the Court below is so to speak ancillary to the original proceedings and is in complete accord with the opinion of this Court in **Scripps-Howard Radio v. Federal Trade Commission**, 316 U. S. 4, 17, that the Court of Appeals was not deprived of its power to stay—"a power as old as the judicial system of the Nation."[1]

For the same reason, the argument of the Commission on pages 12 and 13 of their brief, that fact finding is the exclusive province of the Commission has no basis or application here, nor are the cases they have cited applicable here. And even if the cases cited in support of their argument on page 13, **Federal Trade Commission v. Pacific State Paper Trade Ass'n**, 273 U. S. 52; **Federal Trade Commission v. Algoma Lumber Co.**, 291 U. S. 67, to the effect that the reviewing Court should not pick and choose for itself among uncertain and conflicting inferences, were applicable in this case, there are no uncertain or conflicting inferences. There is undisputed testimony that volume discounts or rebates in one form or another are part and parcel of the entire automobile replacement parts industry (R. 426, 429, 444, 445, 501, 502, 446, 451, 462, 473, 474, 475). This testimony is corroborated by documentary evidence which seems to be

[1] See also Federal Trade Commission Act of 1914, 38 Stat. 719, as amended 52 Stat. 111, 113, 15 U. S. C. 45 (c), authorizing the Court to issue such writs "as are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

ignored by the Commission, being the then Respondent's exhibits showing various contracts giving volume discounts:

Respondent's Exhibits 10B, 100, Regal Tool and Manufacturing Co. (R. 526-528) (R. 309);

Respondent's Exhibit 16, Thompson Products, Inc. (R. 529-531) (R. 473);

Respondent's Exhibits 18A and B, Thompson Products, Inc. (R. 532-535) (R. 473);

Respondent's Exhibit 25-A, McQuay-Norris Manufacturing Co. (R. 537) (R. 477);

Respondent's Exhibit 15, Wausau Motor Parts Co. —referred to and introduced in evidence at R. 473.

All of these are undisputed facts in the record and not inferences. Significantly, the Commission does not deny that such volume discounts or rebates are part and parcel of the entire automotive replacement parts industry and it prudently refrains from comment on the foregoing typical exhibits showing volume discounts or rebates by petitioner's competitors. In its brief on this point, page 13, the Commission states that the testimony we have set forth which is favorable, falls "far short" of a convincing showing of facts on which to base our motion. There is nothing in the record to the contrary—all the testimony and the documentary evidence are undisputed—and in such cases this Court has held in a similar situation that the testimony of officers skilled in their business should be accepted, no statements appearing to the contrary, **International Shoe Co. v. Federal Trade Commission**, 280 U. S. 291; 299. On page 19 of the Commission's brief in the Niehoff case, the Commission states that it has filed 14 complaints against various firms in the automotive replacement parts industry; as every one of these are Section 2 (a) complaints and are based on volume discounts or rebates, this appears as corroboration that it is standard practice in the industry.

Commission cites the fact in note 5 on page 13 of its brief that Sealed Power Corporation, a piston ring manufacturer, has agreed to be bound by a cease and desist order similar to the one entered against petitioner. That decision is Sealed Power Corporation's, not ours. That company is many times larger than your petitioner—it also sells original equipment to the automobile manufacturers—and in all likelihood, will not be harmed financially by the amount of business it will lose in the replacement field by not being able to give volume discounts as do its competitors. Petitioner sells no car manufacturers and should not be rated in the same class, your petitioner being a small manufacturer as compared to many of its competitors. Petitioner is here now battling for its business survival.

II.

The Alleged Huge Task of Subjecting Competitors to Similar Orders Does Not Actually Exist and Could Be Entirely Eliminated if a Trade Practice Conference Were Granted.

On page 14 of the Commission's brief, it states that petitioner erroneously assumes that every member of the so-called "industry" is its competitor, and makes much of an alleged huge administrative task on the part of the Commission which it would have to assume to subject petitioner's competitors to similar orders. Such argument is foreign to and should have no effect on the equity of the situation presented. It seems that the Commission is implying, if not so stating, that such a job is too big for it to undertake, and therefore, they are unable to perform the duties delegated to them by Congress. If this be the fact, is the small concern like your petitioner to suffer loss of business and financial loss or its future existence endangered, because the Commission cannot perform its functions—or should equity come to the small concern's

rescue? We do not believe such a deficiency exists in the Commission. By its own rules it has established a procedure for handling such "huge" tasks. Your petitioner joined in an application under that procedure,—i. e.—a trade practice conference.

If the Federal Trade Commission had granted the petitioner's and other manufacturers' request for a trade practice conference as referred to in our original brief, this alleged huge task of filing complaints against numerous other competitors could not be before the Federal Trade Commission or the Courts for that matter. It would not have been necessary to file all of the fourteen suits which they allege they have filed. The Trade Practice Conference, if it had been called, would probably have eliminated all of the difficulty. We repeat, that the Commission seems to ignore the basic fundamental purpose of the Robinson-Patman Amendment which was to protect small dealers and manufacturers from the large ones, yet ironically the Commission appears here arguing just the opposite. Out of the fifteen named competitors in the testimony in this case (see pages 6 and 18 of our original brief), the Commission has only proceeded against Thompson Products, Sealed Power Corporation and Airtex (Shefford-Master Corp.); and the only conclusion to be arrived at from the state of facts as we have noted, is that petitioner and a few others are being made guinea pigs for the entire industry.

On page 19 of the Commission's brief, it attempts to side-step this obvious fact by stating that it has filed 14 Section 2 (a) complaints against 14 members of the automotive replacement parts industry, but it is highly significant that only 3 out of these 14, as shown above, are competitors of petitioner. The other eleven are not competitors; and significantly may we remind this Court and the Commission that not one single complaint has been filed

by the Commission against any of petitioner's competitors who manufacture leaf springs and allied parts which is a large part of petitioner's business. Out of the three competitors proceeded against, only one of these manufactures coil action and chassis parts, and the petitioner is the smallest firm of the three proceeded against. Outside of Thompson Products and Sealed Power, which are huge concerns, no large manufacturer in the industry has been complained against. The leaf spring line and the coil action and chassis parts line comprise the greater portion of petitioner's business, and if petitioner must submit to the order entered while its competitors continue to offer volume discounts in this highly competitive field, it will suffer certain irreparable injury and certain financial loss. The finding of facts by the Commission states that the field of automotive replace parts is highly competitive (R. 60). On page 15 of its brief, the Commission then goes on to say that if the decree herein is modified and petitioner is granted equitable relief that the Commission would then have to determine:

(1) Who are petitioner's competitors? We answer, they are named in the record here.

(2) They would have to investigate the pricing practices of each. We answer, a typical group of competitor's contracts showing volume discounts, are in the record here, and within a month's time, the Commission could easily secure all of the balance of such contracts not shown in this record.

(3) The effect of each company's price differentials on competition? We answer, if the petitioner's volume discounts injure competition as the opinion of the Commission and Court of Appeals has held, why should there be any different conclusion on the part of the Commission but that similar discount schedules of petitioner's larger as well as smaller competitors involve actual competitive injury. The Morton Salt

case seems to have settled this question (**Federal Trade Commission v. Morton Salt Co.**, 334 U. S. 37).

Such arguments on this point are given by the Commissioner under the facts as shown here seem specious. We repeat, despite the fact that all the complaints it has filed are Section 2 (a) cases, based on volume discounts or rebates, the Commission chooses to ignore the fact that volume discounts are part and parcel of the automotive replacements parts industry and instead of calling a trade practice conference as requested, or filing simultaneous complaints, they instituted the 14 proceedings over a period of some 9 years, all but 2 of which are against small companies. There can be no doubt that the Commission has been derelict in its duties in this respect and this dereliction should not cause irreparable injury to your petitioner.

III.

The Commission Cannot Blind Its Eyes to Obvious Facts in the Record and Is Arguing Against the Very Purpose for Which the Robinson-Patman Act Was Enacted.

The Commission on pages 16 and 17 of its brief makes the astonishing statement that there is no automotive replacement parts industry significant to the present proceedings and that comparison of the petitioners' sales volume with that of the entire industry is empty of meaning because petitioner sells only three so-called lines. This is obviously so stated in an attempt to convince this Court that your petitioner is not a small manufacturer in the industry, and therefore, is not in need of the equitable protection of this Court. Such an argument indicates that the Commission has turned its back on obvious facts. According to the **1957 Global Automotive Market Survey** and **World Motor Census**, there were in use in the United States in the year 1957, 64,600,721 cars, trucks and buses. Every one of these cars, trucks and buses, at some time or

another, need replacement parts and each year as more cars are manufactured and sold, more replacements parts are needed. Your petitioner manufactures and distributes the indicated replacement parts and it is as much an essential part of its industry as the original automobile parts manufacturer. The thousands of different replacement parts manufactured and sold by petitioner are just as essential as the original parts, otherwise, no car could ever have worn parts replaced; as petitioner's total sales volume in 1952 was less than $5,000,000 in a $2,500,000,000 total sales volume for the year, we respectfully submit that the argument advanced by the Commission falls of its own weight. The automotive replacement parts industry understandably is not broken up into small segments of this and that for statistical purposes and the comparison advanced in our brief is proper. Even if the total sales volume of the entire industry were cut in half, our sales volume would still be insignificant in comparison. Your petitioner is in active competition with many of these replacement parts manufacturers as named in the record, including the car manufacturers who manufacture and sell replacement parts through car dealers, and petitioner respectfully submits that the comparison that we have set out in our main brief of the small volume of petitioner as compared to the entire replacement parts industry still holds good. The Commission argues against the very purpose of the Robinson-Patman Act—that is, to protect small business from its large competitors.

IV.

Previously Hereto in Other Large Industries the Commission Has Either Filed Simultaneous Complaints or Held Trade Practice Conferences.

On page 17 of the Commission's brief, it attempts to excuse itself from its action in the cosmetics industry in deferring effective dates of compliance with its order until

all of the others proceeded against were brought under similar orders. The Commission says that it merely exercised its "discretion." We remind this Court and the Commission that the Commission also exercised its "discretion" in the lumber industry when it filed fifty simultaneous complaints against fifty lumber manufacturers. It exercised its "discretion" by recognizing that it would be unfair to proceed against one, two, three or half a dozen and not proceed against the others who were all charged with the same offense. So it exercised its "discretion" so as not to be unfair, by filing against all of them simultaneously. (See reference to the 50 simultaneous filings in **Federal Trade Commission v. Algoma Lumber Co.**, 291 U. S. 67.) In the cement industry, the Commission in **Federal Trade Commission v. Cement Institute et al.**, 333 U. S. 683, filed twelve simultaneous cases with some eighty or eighty-five competitors as defendants in the case.

In the cigarette industry, instead of filing complaints, a trade practice conference was called, and as a result, no complaints had to be filed. (See page 23 of our main brief.)

Such inaction on the part of the Commission indicates not the use of "discretion", but rather lack of a fixed policy. The Commission could just as easily have called the trade practice conference or filed simultaneous complaints against the majority of large and small automotive parts manufacturers in the replacement parts industry. The Commission with but two exceptions in the 14 cases it has filed, has singled out small companies as guinea pigs. Its failure to call a trade practice conference at the request of many manufacturers as one group and many wholesalers as one group, as indicated in our main brief, indicates a failure on the part of the Commission in the performance of the function assigned to it by Congress. Under such circumstances, we believe it to be the duty of this Court in the exercise of its equitable jurisdiction to modify the decree

as requested and to instruct the Commission to take some action on the request for a trade practice conference that has lain in its files gathering dust since April, 1954. The nine years of litigation, initiating complaints against only 14 members out of a large industry, and ignoring requests for a trade practice conference, exposes a grave deficiency in the administrative processes of that agency. Through such actions, as outlined above, and such inaction, your petitioner and other small concerns, who have only been doing what is standard in the industry, giving volume discounts, will suffer untold irreparable loss unless the decree is modified and the effective date of compliance is postponed so that your petitioner can compete with its many and more fortunate competitors in this highly competitive industry.

V.

Cases Cited by Commission in Its Brief Are Not Applicable to the Factual Situation Here.

With reference to the cases cited by the Commission in its brief in the Niehoff case and in its brief in the instant case, none of them deals with a factual situation comparable to the one presented here. In **Federal Trade Commission v. Eastman Kodak Co.**, 274 U. S. 619, which is cited at page 11 of the Commission's Niehoff brief, Eastman was ordered to cease and desist certain unfair practices and also further directed to dispose of certain laboratories. The Court of Appeals affirmed the Cease and Desist portion of the Commission's Order but held that the Commission was without authority to direct the disposal of the laboratories. This Court affirmed the decision of the Court of Appeals and held that the Commission, not being a judicial body, had no equitable jurisdiction This Court also pointed out that the Court of Appeals in reviewing an order of the Commission has the power to enter any order that the Commission could have entered as well as to set

aside or modify any order of the Commission and it was in connection with this discussion that this Court made the comments quoted in Footnote 1 appearing at page 11 in the Commission's Niehoff brief.

In the same footnote on page 11 of the Commission's Niehoff brief, it cites **American Chain and Cable Co. v. Federal Trade Commission,** 142 F. (2) 909. In that case a cease and desist order was entered by the Commission under Section 5 of the Federal Trade Commissions Act and the action was affirmed by the Court of Appeals. Thereafter, American Chain presented a motion to the Commission requesting enforcement of the order be stayed on account of the war emergency. The Commission refused to entertain the motion on the ground that it had no such authority. The Court of Appeals, on American Chain's petition, held that the Commission did have the authority to pass upon the motion in view of the war emergency and entered its order directing the Commission to do so.

On page 11 of the Commission's Niehoff brief, it cites **Federal Communications Commission v. Pottsville Broadcasting Co.,** 309 U. S. 134. This case does not involve the Clayton Act, but arose under the Federal Communications Act. Pottsville had filed a request for a license to construct a radio station which was denied by the Federal Communications Commission. The Court of Appeals reversed this order on appeal and remanded the case to the Commission. In the interim, two other applications had been filed with the Commission for stations in the same general area, and the Commission thereupon set all three applications for its joint consideration at the same time. Pottsville again went to the Court of Appeals which issued a writ of mandamus directing the Commission to consider Pottsville's application alone. This Court on appeal reversed that decision and held that in dealing with matters involving public convenience and necessity the Communications Commission was not limited to the original record,

but could and should consider all of the circumstances as disclosed by the two latter applications and it was in connection with such facts that this Court made the statement quoted in the Niehoff brief.

On page 12 of the Niehoff brief the Commission cites **Scripps-Howard Radio v. Federal Trade Commission**, 316 U. S. 4. That case involved the sole question whether the Court of Appeals had the power to stay an order of the Communications Commission pending review. This Court held that the Court of Appeals did have such power, particularly where it was necessary to prevent irreparable injury.

On pages 13 and 14 of the Commission's Niehoff brief, it cites **United States v. Wabash Railroad Co.**, 321 U. S. 403. In that case, the Interstate Commerce Commission had issued an order prohibiting carriers serving A. E. Staley Mfg. Co. from granting it a spotting allowance in violation of a certain section of the Interstate Commerce Act which prohibits carriers from granting shippers anything not specified in the filed tariffs. Staley asked that the order be set aside since enforcement would place it at a disadvantage unless similar orders were issued against the railroads serving its competitors. On appeal this Court held that the order should not be set aside and pointed out that under the Interstate Commerce Act, Staley had the right to initiate its own proceedings with the Interstate Commerce Commission to compel other railroads, serving its competitors, to stop similar practices and that in view of this fact that the Commission's order should not be set aside. In effect, this Court held that Staley had a complete and adequate remedy in the Interstate Commerce Act.

In the instant case, no such statutory remedy exists whereby petitioner can force or induce the Federal Trade Commission to exercise its discretion or to perform its

duty as against petitioner's competitors. The Commission states in its footnote on page 14 of the Niehoff brief, anticipating the distinction we have noted above, that the petitioner could bring triple damage actions or injunctive proceedings against its competitors. Petitioner's counsel and this Court are familiar with the tremendous cost, the length of time consumed in pursuing such remedies, as well as their difficulty, all of which shows the total inadequacy of the remedy as well as the uncertainty in result; **nor does this remedy serve to keep petitioner in business and enable it to retain its customers as against competitors. No amount of damages could compensate for such loss.** Therefore, the cited case is certainly not analogous or comparable to the present situation. None of the other cases cited by the Commission either in the Niehoff brief or in the Moog brief deals with the power of a Court upon a showing of irreparable injury in the record, to modify a decree of the Commission pending institution of similar proceedings against its competitors.

CONCLUSION.

For the reasons assigned, it is respectfully submitted that this Court should grant the prayer of petitioner as set forth in our original brief.

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